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In the

Supreme Court of the United States

October Term, 1950

No._____

STATE OF GEORGIA, Petitioner

v.

J. B. WENGER, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh District

To the Honorable The Chief Justic of the United States and the Associate Justices of the Supreme Court of the United States:

The State of Georgia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 23, 1951.

I.

OPINIONS BELOW

The opinion of the District Court (R. 15-23.) is reported in 94 Fed. Supp. 976. The opinion of the Court of Appeals (R. 33-37.) is reported in 187 Fed. 2d. 285.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1951. (R. 38.) A petition for rehearing filed on March 9, 1951 (R. 39-49.) was denied March 22, 1951. (R. 51.) The jurisdiction of this Court is invoked under 28. U.S.C., Section 1254 (1).

III.

QUESTIONS PRESENTED

Whether a State (alleging violation of its liquor laws) may maintain, in a Federal District Court, a civil action ex delicto against a citizen of another State for violation of the prohibitions of Section 2 of the Twenty-first Amendment and of Section 122 of Title 27 of the U.S.C.; more specifically:

1. Does the plaintiff State assert a right having an immediate basis in and arising under the Constitution and laws of the United States?

2. Does Section 2 of the Twenty-first Amendment by virtue of its own force, or as implemented by the Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122), create a right in the plaintiff State which is civilly enforceable?

3. Should not the District Court (jurisdiction found to exist) have proceeded to adjudicate the plaintiff's claim to relief based upon non-Federal rights notwithstanding a decision adverse to plaintiff upon the Federal claim?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional and statutory provisions are printed in Appendix A, Infra, p. 20.

V.

THE STATEMENT

A civil suit for damages was filed by the State of Georgia against J. B. Wenger, a citizen of Illinois, in the United States District Court for the Eastern District of Illinois on March 29, 1950. (R. 3.) This action was brought by the State of Georgia to recover damages caused by an unlawful conspiracy and acts done in furtherance of that conspiracy. (R. 3-7.) Before answering the complaint, defendant moved to dismiss for want of jurisdiction of the action and for failure to state a claim upon which relief can be granted. (R. 11.) The motion to dismiss was filed May 1, 1950. Additional grounds of the motion to dismiss were either cured by plaintiff's amendment to the complaint (R. 13.) or were not passed upon by the District Court as being unnecessary to the rendition of a final judgment. The District Court determined that jurisdiction existed, but dismissed the complaint upon its merits as failing to state a Federal claim upon which relief can be granted and declined to decide whether a sufficient claim was stated under State law. (R. 13-23.) The judgment of the District Court was entered on July 22, 1950. (R. 24.) The origin of the errors relied upon arise out of this ruling dismissing the complaint.

In substance, the complaint (R. 3-7.) charged that

defendant agreed and conspired with other persons to ship and transport distilled intoxicating liquor from Illinois to Georgia, which liquors were intended to be received, possessed, sold and used in violation of the laws of Georgia. Pursuant to his agreement and conspiracy, defendant did ship and transport, and cause to be shipped and transported into Georgia 26,356 cases of such liquor to consignees who were by Georgia law prohibited from receiving, possessing, or reselling such liquor, but who did, nevertheless, illegally receive, possess and resell the same. None of Georgia's warehouse charges or excise taxes were paid upon any of this liquor and Georgia was defrauded of these warehouse charges and taxes aggregating $395,340.00 upon the quantity of liquor so shipped. Plaintiff seeks to recover judgment for this amount.

Plaintiff predicated her claims on the jurisdiction of the District Court upon the existence of a Federal question. The conspiracy had as its object and purpose, according to the complaint, the violation of the prohibition contained in Article 2 of Amendment XXI to the Constitution of the United States and the violation of the prohibition contained in the re-enacted Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122). It is the theory of Georgia's case that Section 2 of the Twenty-first Amendment, alone or in conjunction with the Webb-Kenyon Act, creates an actionable right in the State of Georgia.

The Court of Appeals for the Seventh Circuit, court below, in an opinion (R. 33-37.) affirmed the judgment of the District Court and entered a judgment on February 23, 1951. (R. 38.)

The State of Georgia petitioned the Court of Appeals for a rehearing on March 9, 1951 (R. 39-49.) admitting that her claim on Federal grounds was a question

which the Courts have never been previously asked to decide, but urging that Court to modify its opinion to permit a decision on Georgia's claim upon the non-Federal grounds, suggesting the existence of a probable conflict with decisions of this Court to do otherwise and certain conflict with decisions of other Courts of Appeal. It was further urged in the Court below (R. 47.) that, even if that Court held that jurisdiction of the claim on non-Federal grounds was discretionary, this case should not be dismissed for the reason that the only Federal Court available to a Plaintiff State upon a basis of diversity is this Court and that this Court should not be asked to try this case as an original suit[1] unless all other Federal forums have failed.

The Court below denied the petition for rehearing March 22, 1951. (R. 51.)

VI.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to hold that Section 2 of the Twenty-first Amendment alone, or as implemented by the Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122), had as its purpose the protection of the States against importation of intoxicating liquor in violation of State laws; thereby creating a right in the States.

2. In failing to hold that where Constitutional and statutory rights are violated, the Federal Courts should frame or adjust remedies to grant necessary relief appropriate with the traditional concepts of Anglo-American law.

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[1] Constitution of the United States, Article III, Section 2; 28 U.S.C. 1251.

3. In failing to hold that the District Court, having found jurisdiction to exist, should have proceeded to adjudicate plaintiff's claim to relief upon non-Federal rights notwithstanding a decision adverse to plaintiff upon the Federal claim.

4. In failing to hold that relief on the non-Federal claim may be had at law as well as in equity, at the common law as well as by statute.

5. In affirming the judgment of the District Court.

VII.

REASONS FOR GRANTING THE WRIT

1. *There exists a direct conflict between the decisions of the Court below and the decisions of several Courts of Appeal.*

The conflict arises over the effect to be given the rule of this court announced in *Siler v. Louisville and Nashville R. Co.*, 213 U. S. 175 and *Hurn v. Oursler*, 289 U. S. 238, recently reaffirmed.[2] The court below in the instant case (reported as 187 Fed. 2d. 285) at page 287 stated the above rule to be "that when, by virtue of a substantial Federal question, a Federal court obtains jurisdiction, it must proceed to decide all the questions in the case even though it decides the Federal question adversely to the parties raising the question."

No apparent conflict exists between circuits as to the statement of this rule but there exists a lack of uniformity of judgment in cases where an invocation of the so-called *Siler* and *Hurn* doctrine is sought be-

[2] Armstrong Paint and Varnish Works v. Nu-Enamel Corporation, 305 U.S. 315, and Hillsborough Twp. v. Cromwell, 326 U. S. 620, 622.

cause of the divergent application of the rule by various circuits.

The court below, after restating the doctrine of the *Siler* and *Hurn* cases, held that a dismissal of a claim as based on Federal grounds, upon a motion to dismiss, amounts to a dismissal of the whole case including the claim as based on non-Federal grounds. In so holding the court below stated that where the district court upon a motion to dismiss "determined that the allegations of the complaint did not state a claim under the Federal Constitution or laws upon which relief could be granted . . . (and) . . . disposed of the case on the Federal ground upon which jurisdiction was based" the claim on the non-Federal ground fell with the dismissal of the Federal ground. Reliance was placed on *Bell v. Hood, D. C.*, 71 Fed. Supp. 813, and *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, 1 Cir., 183 Fed. 2d. 497, 501.[3]

This petitioner perceives the above holding to be in direct conflict with decisions of the Second and Ninth Circuits in the cases of *Fay v. Douds*, 2 Cir., 172 Fed. 2d. 720; *Casey v. American Export Lines, Inc.*, 2 Cir., 176 Fed. 2d. 337; *Markert v. Swift and Co.*, 2 Cir., 187 Fed. 2d. 104; *Southern Pacific Co. v. Van Hoosier*, 9 Cir., 72 Fed. 2d. 903; and *Southside Theaters v. West Coast Theater Corporation*, 9 Cir., 178 Fed. 2d. 648.

Chief Judge Learned Hand, in *Fay v. Douds*, supra, (where a motion to dismiss was directed to a petition which asserted a claim on both Federal and non-Federal grounds) stated the rule as interpreted by, and adhered to in, that Circuit as follows:

"If this assertion of constitutional right is not

[3] Plaintiff in her petition for rehearing in court below urged that reliance upon the above authority as support for the proposition there stated was inappropriate. (R. 47)

> transparently frivolous, it gave the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable. Although, as will appear, we do not think that . . . (the plaintiff) . . . was denied any constitutional right, we do think that its contention is not so plainly untenable that the District Court might not proceed to decide the other issues involved."

In *Markert v. Swift and Co.*, supra, after quoting from the *Hurn* case, the Second Circuit held in an employee's action against the employer for overtime compensation and liquidated damages under the Fair Labor Standards Act, that a count alleging that the employer had a duty to furnish sterile uniforms to plaintiffs at employer's expense, either on grounds based on contractual agreement or based on regulations of Department of Agriculture (the latter ground presented Federal question), alleged two grounds for a single cause of action rather than two separate and distinct causes of action. Such a holding conflicts with the decision below.

In direct conflict with the judgment of the court below, which held that a dismissal on the Federal ground dismisses the whole case, is the case of *Casey v. American Export Lines, Inc.*, supra, where the Second Circuit in an opinion per curiam, after finding no merit in a claim on Federal grounds, returned the case to the District court in order to permit the plaintiff to urge an adjudication upon the non-Federal grounds.

The Ninth Circuit in *Southern Pacific Company v. Van Hoosier*, 72 Fed. 2d. 903, gives the same effect to the pragmatic rule of the *Siler* and *Hurn* cases as is

accorded by the Second Circuit. The plaintiff in the *Southern Pacific Company v. Van Hoosier* case brought an action for freight charges on the theory that the interstate rate was applicable and that the intrastate rate was inapplicable. The defendant admitted owing the lesser intrastate rate. Jurisdiction was based upon the Federal question presented by an action to recover rates established under the Interstate Commerce Act. The Federal question was decided adversely to the plaintiff, but nevertheless, the court rendered a judgment against the defendant for the amount of his admitted indebtedness, following the reasoning of *Siler* and *Hurn* cases. This principle was recently reaffirmed in the Ninth Circuit in the case of *Southside Theaters v. West Coast Theater Corporation*, 178 Fed. 2d. 648.

In none of the foregoing opinions in the Second and Ninth Circuits, which give effect to the *Siler* and *Hurn* decisions of this court, is there intimated that the District Court is deprived of "jurisdiction" of the non-Federal questions because the Federal questions are dismissed upon motion, nor is there intimated that the District Court exercises a discretion as to an adjudication of the claim based on non-Federal grounds. In fact, as noted in *Fay v. Douds*, supra, the Second Circuit held that the District Court should dispose of *all* other questions which arose even though they would not have been independently justiciable.

While the court below does not expressly hold that "jurisdiction" of the claim on non-Federal grounds is discretionary, its reliance upon *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra, might seem to so indicate. In this regard, it is significant to note that in *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra, Judge

Frank in his concurring opinion states that were he sitting in the Second Circuit, he would not feel obligated to follow the rule of discretion as indicated in the concurring opinion of *Strachman v. Palmer*, 1 Cir. 177 Fed. 2d. 427, which was approved by the First Circuit in *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra.

The view taken by the court below is not only in conflict with the views of other circuits but is in probable conflict with the decisions of this Court in the *Siler* and *Hurn* cases, and the cases which follow them. For certainly, if, as in the court below, the "whole case" is to fail because of what is deemed to be an unsound legal position on the Federal grounds (although for jurisdictional purposes found to be substantial and not frivolous) rather than to fail because no substantial identity of right or proof is shown, then *Siler* and *Hurn* can have no meaning, for under the decision below, regardless of how closely the facts, proof, and legal positions may be related, a dismissal based on the Federal grounds deprives the court of "jurisdiction" to adjudicate the "whole case." There can be no doubt but that the judicial power of the United States extends to the "whole case" as based on Federal and non-Federal law.[4]

(a) *Aspects of the above doctrine not here applicable.*

The rule of the so-called "constitutional cases" that local questions involving substantial State policy should be held in abeyance until local questions are authoritatively adjudicated by the State court[5] is not applicable to the instant case because no unsettled

[4] Osborn v. The Bank of the United States, 9 Wheat. 738, 822.

[5] Railroad Commission of Texas v. Pullman Company, 312 U. S. 496; Spector Motor Service v. McLaughlin, 323 U. S. 101.

matters of State policy are involved, furthermore this case is not susceptible of being split into two law suits since there is an identity of proof and an identity of right asserted based both upon Federal and non-Federal grounds, placing it squarely within the *Siler* and *Hurn* decisions.

The difficulties that arose early after the *Hurn* case as to what is to be deemed a part or ingredient of a single "case" or "cause of action" and what guide posts show the way through this uncertainty[6] are not here present since neither the court below nor the District court, whose decision it affirmed, evinced any opinion in that regard since such questions were never reached because of the holding that dismissal of the Federal grounds upon a motion to dismiss amounts to a dismissal of the whole case.

2. *The questions presented by this case are of paramount importance.*

(a) *Important constitutional issues.* Clearly, the question of whether the clear and unambiguous language of the Twenty-first Amendment by virtue of its own force, or as implemented by the Webb-Kenyon Act, creates actionable rights in the States, is a question of great and far-reaching importance. A settlement of this question by this court is plainly in the public interest, since it affects all of the States in the enforcement of their respective liquor laws. The force and effect to be given this provision of statutory and constitutional language is particularly in the public interest in view of the recent investigation conducted by the

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[6] See, for instance, Lewis v. Vendome Bags, 108 Fed. 2d. 16; Treasure Imports, Inc. v. Henry Amdur & Sons, Inc., 127 Fed. 2d. 3; Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 Fed. 2d. 9; Zalkind v. Scheinman, 139 Fed. 2d. 895.

Special Senate Committee on Organized Interstate Crime, popularly known as the Kefauver Committee, whose interim reports to Congress focus attention on the inability of States to cope with conspirators beyond their boundaries who confederate with and provide inducement for violators located within the State borders.

(b) *The questions presented are important because of the nature of one of the parties.*

Since the plaintiff is a State which may proceed by original suit in this court, it is important that this court should grant certiorari so that plaintiff may comply with the express desires of this Court that all available Federal forums fail before a petitioner files an original suit. It was urged in the court below that this was one of the strongest reasons against a dismissal in this case and that the court below should be reluctant not to adjudicate the whole case. (R. 47-48.)

3. *The decision of the court below was erroneous.*

Petitioner believes the decision below to be erroneous, moreover, it is believed that that decision in all probability conflicts with applicable decisions of this court for the reasons specified as errors herein previously assigned and now treated somewhat more fully.

(a) *It is Georgia's contention that Section 2 of the Twenty-first Amendment by its own force creates a Federal right or interest in the plaintiff.*

The plain language of the section purports to forbid and prohibit the acts of the defendant described in the complaint. This Court's views, as understood by this petitioner, treat the prohibitory words of Section 2 of the Twenty-first Amendment as Federal law command-

ing obedience, notwithstanding the absence of a criminal penalty.[7]

Section 2 of the Twenty-first Amendment being plain and unambiguous, its language should be literally applied. This court has commented upon the clarity of the language contained in Section 2 of the Twenty-first Amendment and has refused even to discuss reading into this clear language a limitation based upon the court's decisions applying to the Wilson Act, the Webb-Kenyon Act and the Reed Amendment.[8]

It has long been a rule of construction that where the language is plain, there is an end to construction, and the statute, or constitutional provision, is taken to mean what it says. The strongest reasons dictate giving the constitution a broader and more objective interpretation than is accorded a statute.[9]

The Twenty-first Amendment was adopted for the benefit and protection of the States. The central government, although supreme in its enumerated powers, was not created to be an opponent or rival of State governments, but was created to supplement and to protect them. Thus, on numerous occasions, States in the exercise of their general police power have been given aid in the protection of their borders by the Congress which in such instances has expressed a plain purpose to make State enforcement of police powers effective. States in the exercise of their police power regulate the stealing of automobiles, but Congress supplementarily forbids and prohibits interstate transportation of stolen cars. *Brooks v. U. S.*, 267 U. S. 432.

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[7] Carter v. Virginia, 321 U. S. 131, 138; Duckworth v. Arkansas, 314 U. S. 390, 397.

[8] See, for instance, State Board of Equalization v. Young's Market, 299 U. S. 59, 63, 64; Mahoney v. Joe Triner Corp., 304 304 U. S. 401, 404.

[9] Lake County v. Rollins, 137 U. S. 662, 670.

States may forbid the sale of convict-made goods within their borders and the Congress by the Ashurst-Sumners Act made unlawful the interstate transportation of such goods. *Kentucky Whip and Collar Co., v. Illinois Central R.R. Co.*, 299 U. S. 334.

The Lottery Act supplements in the Federal domain a police power residing in the States. *Champion v. Ames*, 188 U. S. 321.

Regulations in the interest of public health are an exercise of State police power but in the case of the Filled Milk Act, Congress has supplemented State regulations. *Carolene Products Co. v. U. S.*, 323 U. S. 18. Congress by the Mann Act and the Federal Kidnapping Act has supplemented State enforcement of local white slave and kidnapping laws. *Hoke v. U. S.*, 227 U. S. 307; Chatwin v. U. S., 326 U. S. 455.

By the Jenkins Act, Congress has co-operated with the States in the collection of State taxes upon the sale and use of cigarettes. *Consumer Mail Order Association v. McGrath*, 94 Fed. Supp. 705; affirmed by this Court, No. 508 of the October Term, 1950.

It can hardly be contended that the States were not the intended beneficiaries of the Twenty-first Amendment. The Federal creation of actionable legal rights in the States is by no means unknown. But for the provision of Article III, Section II of the Constitution of the United States conferring upon the Supreme Court jurisdiction of controversies between two States, there is no source from which a right of action of one State against another is derived.[10] Not only may actionable Federal rights be established by and derived

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[10] Missouri v. Illinois, 200 U. S. 496.

from the Constitution, but upon occasion they are derived from Federal Statute.[11]

The Webb-Kenyon Act was not a mere delegation of power to the States, but a regulation of commerce; and none of the decisions holding that the Webb-Kenyon Act relieved the States of th .imitations placed by the commerce clause on their powers over the transportation or importation of intoxicants ruled that the Act had no other result or effect. This is a point of first impression and plaintiff submits that it may be maintained on principle and on precedent.[12]

By way of summary on this point it can be hardly doubted but that the plain language of both the constitutional provision and the statute, here in question, give plaintiff State a standing which entitles her to relief based on the right or interest created by the Constitution and laws of the United States. See concurring opinion of Mr. Justice Frankfurter in *Anti-Fascist Refugee Committee v. McGrath* — U. S. —, 95 L. Ed. (adv. ops.) 561, 576.

(b) *It is Georgia's contention that where constitutional and statutory created rights are violated, the Federal courts should frame or adjust remedies and grant necessary and appropriate relief.*

The violation of the right or interest created and guaranteed by the Twenty-first Amendment and the Webb-Kenyon Act is an appropriate subject for judicial redress and is, therefore, actionable.

For every legal right there exists a legal remedy

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[11] Georgia v. Pennsylvania Railroad, 324 U. S. 439; Georgia v. Evans, 316 U. S. 159.

[12] Clarke Distilling Company v. Western Marylond RR. Co., 242 U. S. 311, 326; Adams Express Co. v. Kentucky, 238 U. S. 190; Vance v. Vandercook, 170 U. S. 438; McCormick and Co. v. Brown, 286 U. S. 131, In Re. Rahrer, 140 U. S. 545.

for the invasion of that right. As early as 1803, the Supreme Court considered this proposition in the famous case of *Marbury v. Madison*, 1 Cranch, 137. There the court concerned itself, among other things, in determining whether Marbury had a right of action for mandamus. Although statute law of the United States then of force referred to the writ of mandamus as one within the judicial power of the Supreme Court, no statute purported to give to any class of litigants a legal right to sue for and obtain the writ. Notwithstanding this statutory vacuum the court decided that Marbury was entitled to have the writ to enforce his federal right. At page 162 the Court said in that connection:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

In *Texas, etc. Ry Co. v. Brotherhood of Ry. Clerks*, 281 U. S. 548, this Court considered a suit for injunction against acts plainly prohibited by the Railway Labor Act of 1926 but for which no penalty or other remedy was provided. Chief Justice Hughes, for the full bench, said that this prohibition cannot be overridden and as it is capable of enforcement, it must be enforced. He disposed of the point upon the authority of *Marbury v. Madison*, saying:

"The right is created and the remedy exists . . ."

Such illustrations of judicial redress in the absence of a statute creating a right of action could be multiplied by numerous physical precedents where, for example, national banks have maintained actions on contracts and on torts, seeking legal and equitable relief

on the basis of the Federal question presented by the Federal origin of their charters and unaided by Federal statutes declaring their claims actionable. Perhaps more pointed as authority are those cases where Federal Courts have permitted recovery of taxes illegally collected upon the theory of a quasi-contract right although not by statute made recoverable upon such theory. *Dooly v. U. S.* (1901), 182 U. S. 222, is of this class. And see cases there cited at pp. 228-230.

This court, in *Bell v. Hood*, 327 U. S. 678, recently had occasion to decide whether a suit brought against F.B.I. agents for money damages and alleging violation of the 4th and 5th Amendments presented a substantial Federal question sufficient to withstand a motion to dismiss on the ground that the cause of action was patently without merit.

After deciding that the cause was neither frivolous nor immaterial, this court concluded that the claim asserted there under the 4th and 5th Amendments presented a substantial Federal question sufficient to withstand a motion to dismiss on the ground that the cause of action was patently without merit.

After deciding that the cause was neither frivolous nor immaterial, this court concluded that the claim asserted there under the 4th and 5th Amendments presented a substantial question which had never been decided. The nature of the Bill of Rights having long been established and well understood when the case was decided.[13]

In *Jackson County v. U. S.*, 308 U. S. 343, this court dealing with a treaty right which inured to the benefit

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[13] Boyd v. United States, 116 U. S. 616, which held that Amend. 1 through 8 created no new rights, but simply limited the powers of the Federal Government.

of Indian wards and of the fact that Congress failed to provide specifically the nature and extent of relief to be afforded for its violation, said:

> "[It] has left such remedial details to judicial implication. Since the origin of the right to be enforced is the treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States."

The foregoing examples are illustrious of this Courts historic and continued effort to frame and adjust remedies for the protection and enforcement of Federally created rights and interests where a statutory right of action has not been provided. Such remedial action by the Judiciary is necessary, otherwise Congressional inaction would have the effect of overriding constitutionally vested and protected rights.

(c) *It is Georgia's contention that the District court, having found jurisdiction to exist, should have proceeded to adjudicate the whole case including the plaintiff's claim to relief upon non-Federal grounds notwithstanding a decision adverse to the plaintiff upon Federal grounds.*

When jurisdiction is invoked upon the basis of a Federal question and when the court finds in favor of its jurisdiction because of the existence of a substantial Federal question, but nevertheless decides that no Federal claim has been stated upon which relief can be granted, it should nevertheless retain jurisdiction to determine whether plaintiff is entitled to relief upon the same cause of action based upon applicable non-Federal law. *Siler v. The Louisville and Nashville R. R. Co.*, 213 U. S. 175; *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Hurn v. Oursler*, 289 U. S. 238. Also to the same effect, *Green v. Louisville & I. R. Co.*,

224 U. S. 499; *Chicago Great W. R. Co. v. Kendall*, 266 U. S. 94, 97, 98; *Risty v. Chicago R. I. & P. Ry Co.*, 270 U. S. 378, *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *Armstrong v. Nu-Enamel Corp.*, 305 U. S. 315; *Hillsborough Twp. v. Cromwell*, 326 U. S. 620, 629.

Inasmuch as the tortious conspiracy here alleged by the plaintiff is inseparable from the Constitutional and statutory violations, it would appear that a failure to establish a claim based upon the Federal violation would not deprive the plaintiff of relief on her claim for damages arising from tortious conspiracy as based on the non-Federal grounds.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia

M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney General of Georgia

LAMAR W. SIZEMORE,
Assistant Attorney General of Georgia

Attorneys for Petitioner

APPNDIX A

Section 2 of Amendment XXI of the Constitution of the United States:

> "The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

Webb-Kenyon Act (49 Stat. 877):

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory ,or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." (Mar. 1, 1913, c. 90, 37 Stat. 699: Aug. 27, 1935, c. 740, § 202 (b), 49 Stat. 877.) . . . 27 U.S.C.A. Sec. 122.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 130

STATE OF GEORGIA, *Petitioner,*

v.

J. B. WENGER, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH
Chicago, Illinois
Attorney for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 130

STATE OF GEORGIA, *Petitioner,*

v.

J. B. WENGER, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

J. B. Wenger, respondent, prays for denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 23, 1951, and presents this, his brief in opposition to the petition for such writ by the State of Georgia.

I.

OPINIONS BELOW.

The opinion of the District Court (R. 15-23.) is reported in 94 Fed. Supp. 976. The opinion of the Court of Appeals (R. 33-37.) is reported in 187 Fed. 2d. 285.

II.

JURISDICTION.

The jurisdiction of this Court has been invoked by the petitioner under Title 28, U.S.C., Section 1254 (1) and in the District Court under Title 28 U.S.C. Section 1331.

III.

QUESTIONS PRESENTED.

1. Does the Twenty-first Amendment to the Constitution of the United States, or the Webb-Kenyon Act (27 U.S.C., Section 122) create or authorize a civil tort action by a State against a resident of another State for violation; and more specifically, is such an action created where the damages alleged are the loss of taxes and fees claimed to be imposed or due, only under the laws of the Plaintiff State?

2. Where a Federal District Court, in a suit by a citizen of another State, has considered the pleadings and determined that no Federal question exists, is it required to retain jurisdiction, (a) for the purpose of determining whether purely State questions exist, where not clearly apparent, and (b) for the purpose of enforcing purely State penal and tax laws?

IV.

REASONS FOR DENIAL OF THE WRIT.

1. The Twenty-first Amendment to the Constitution, Section 2, and the Webb-Kenyon Act (Section 122, Title 27, U.S.C.) divest liquor of its interstate character in certain cases; but do not create or authorize any cause of action either civil or criminal.

At no stage of the proceedings in this cause has the petitioner cited an authoritative case or other precedent, which will support the cause of action, which its complaint purports to describe.

The respondent knows of no authority supporting the action, and on the contrary states that the prior decisions of this Court support the conclusion of the District Court, and of the Court of Appeals, to the effect that the alleged action does not exist.

The petitioner seeks to induce the Federal Courts to create a basis for entertaining the action by adopting a new and unwarranted theory.

The District Court below in its memorandum opinion, found, under authority of *Bell* v. *Hood,* 327 U. S., 678, that it must accept jurisdiction of the cause to determine the pleadings. (R. 17-18)

Both the District Court and the Court of Appeals examined the cases cited by the petitioner, in support of the contention that it has a cause of action under the Twenty-first Amendment, Section 2, and the Webb-Kenyon Act, and found, on the basis of cases heretofore decided by this Court, *McCormick* v. *Brown,* 286 U. S. 131; *Duckworth* v. *Arkansas,* 314 U. S., 390; *Carter* v. *Virginia,* 321 U. S. 131; and *U. S.* v. *Frankfort Distilleries,* 324 U. S., 293, that no cause of action accrues under these Sections, and that the Twenty-first Amendment, Section 2, and the Webb-Kenyon

Act accomplished but one purpose, that it, to relieve the States of the limitations of the commerce clause on their powers over transportation or importation of alcoholic liquor.

Neither the Twenty-first Amendment nor the Webb-Kenyon Act, by their own terms, prescribe any penalties for violation, and neither defines or asserts any cause of action.

The petitioner argues, at Page 13 of its petition, that the Twenty-first Amendment was adopted for the benefit and protection of the States, and infers that it is the creation of the Central Government. This, however, ignores the fact that the Twenty-first Amendment was adopted and ratified by action of the States, and was in effect, a revocation of power granted by the States under the commerce clause of the Constitution.

The Twenty-first Amendment, Section 2, uniformly has been construed as having the same effect as the Webb-Kenyon Act, which was entitled "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases."

In *Dunn* v. *U. S.* 98 F. 2d, 119, at Page 124, Judge Williams, dissenting, quotes from the Congressional Record, and shows substantial ground for the belief that the purpose of proposing Section 2 of the Twenty-first Amendment to the Constitution, was to guard against the possibility that the Webb-Kenyon Act might be held unconstitutional in some future tests, and that prior decisions upholding state regulation of liquor transportation might be overruled by the courts.

The Liquor Enforcement Act of 1936, formerly at Section 221 *et. seq.,* Title 27, U.S.C., now contained in Section 1262 of the New Title 18, Crimes and Criminal Pro-

cedure, U.S.C., effectively shows that the Congress considered it necessary to adopt legislation to create a cause of action for criminal violations against the philosophy of the Twenty-first Amendment, Section 2, *Dunn* v. *U. S.* 98 F. 2d. 119. The causes of action, however, are a criminal action by the United States, and a civil action for forfeiture on behalf of the United States. No cause of action whatsoever was created on behalf of any state, or any other party.

Petitioner has argued at Pages 13 and 14 of its petition, that the Congress has adopted many acts to supplement the States in the execise of their general police power, and cites the Federal laws prohibiting interstate transportation of automobiles, convict made goods, lottery tickets, filled milk, kidnapped persons, women for purposes of debauchery, and the statute requiring filing of reports on interstate sales of cigarettes.

The petitioner does not, however, contend in its petition, that any of these acts would authorize a State to bring an action in tort for civil damages because a stolen automobile, or filled milk, or cigarettes were transported into the State in violation of such Federal penal statutes.

The only damages claimed by the petitioner, a sovereign State, is the loss of taxes claimed to be imposed only under Georgia statutes.

The appendix to the complaint, and incorporated as part of it, is a pamphlet, contained at Page 9 of the Record. This pamphlet purports to contain the laws and regulations of the State of Georgia relating to distilled spirits.

The theory of control set up by the Georgia Statute appears to be such that, all liquor imported into the State must be delivered to a State warehouse, which shall

impose certain warehouse charges and taxes upon the liquor, and which shall require payment of said taxes and charges before the liquor is released. Thus, the tax and charges are imposed upon the liquor itself, rather than upon any person. Along with such provisions are criminal sections providing that it is a violation of the Georgia law to accept liquor, except through the State warehouses (Page 6 of Pamphlet). It is also provided that the liquor and the vehicle carrying it may be confiscated by the State of Georgia, if it is imported into Georgia other than through the State warehouses. These are the controls, methods and sanctions which the legislature of the State of Georgia has seen fit to impose.

There is no authority in the statute, as contained in the complaint, for a civil suit for damages against persons who are considered to have avoided the tax. If their unlawful possession of liquor is detected, then the liquor and vehicle containing it may be forfeited, and the violators punished by criminal action. If the liquor cannot be found for seizure by the State of Georgia, the transgressors may be prosecuted under the criminal laws of the sovereign State of Georgia. There is no basis whatsoever under the laws of the State of Georgia, relied on by the petitioner, for such an action as the one brought in the complaint at bar.

The Court of Appeals below found "Here it is clear that plaintiff predicated her claim on the theory that her cause arose under the Constitution and Laws of the United States". (R-37)

The respondent respectfully contends that no other theory or cause of action is advocated in the complaint. No common-law action at tort for civil damages exists, whereby a State, having sovereign powers for enforce-

ment of law within its territorial limits, may sue, in tort, for civil damages for mere breach of penal laws, or tax laws. It is clear from an examination of the complaint (R-3 and its appendix, R-9), that the legislature of Georgia has not created such an action. The only liability for breach of Georgia's Revenue Act to regulate liquors, is criminal prosecution, or forfeiture of liquor. No personal actions for damages exist at common-law, or by statute, in favor of the State of Georgia.

The respondent respectfully contends that the only action which the complaint purports to set forth, is one for damages for breach of the Twenty-first Amendment and Webb-Kenyon Act.

It is respectfully submitted that when this cause of action was found to have no basis in the Federal constitutional provision, and statute relied upon, then no cause of action whatever was alleged by the complaint, and that the dismissal, by the District Court, on the merits of the Federal controversy, exhausted the possibilities of the complaint.

2. Where the complaint is predicated on the single theory that the cause of action arises under the Constitution and Laws of the United States, and it is determined from the complaint and motion to dismiss that the jurisdictional Federal question does not exist, then the complaint should be dismissed.

The District Court stated:

> "Being of the opinion first stated, I am of the further opinion that this court is not required to retain the case to determine the merits of the plaintiff's claim under the laws of the State of Georgia for the reason the complaint states no Federal cause of action, but relies upon a constitutional amendment and an act of congress from which no cause of action can arise. *Bell* v. *Hood*, 71 F. Supp. 813, 817-821." (R. 22).

The Court of Appeals (R. 37) said:

> "But whether a complaint states a cause of action on which relief could be granted, is a question of law. Here it is clear that plaintiff predicated her claim on the theory that her cause arose under the Constitution and the laws of the United States."

It thus appears that the petitioner's contention that this case requires the attention of the Supreme Court because the decision is in conflict with *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S., 175, and *Hurn* v. *Oursler,* 289 U. S., 238, and similar cases, is not sound.

In the case at bar only one cause of action was alleged and advocated in the complaint. That was a claim for damages in a tort action by a State against the citizen of another State for violation of a constitutional provision and a statute of the United States. The Courts below found that no such cause of action can arise under the sections relied upon for jurisdiction, and the violation of which are alleged as the tort complained of.

Examination of the complaint (R. 3-9), and particularly, examination of Paragraph 4 (R. 3-4), and of Paragraph 7 (R. 5-6), show that twelve (12) residents of Georgia, as well as the respondent, a resident of Illinois, are alleged to have conspired and accomplished the transportation of liquor into Georgia in violation of its laws, cited as an appendix to the complaint. (R. 9)

If a tort action for civil damages exists for violation of the Georgia laws, the record does not show that any such action has ever been brought against these twelve (12) residents of Georgia. Certainly no such cause of action is alleged in the complaint against the respondent.

Since a single cause of action was alleged, and only one remedy sought, based on Federal laws, which did not

authorize or support the action, it was properly dismissed. The Courts below have refused to search the complaint for the possible existence of a State cause of action, which is not apparent on the face of the complaint. This feature alone, distinguishes the case at bar from *Silver* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, and *Hurn* v. *Oursler,* 289 U. S. 238, and the cases following them.

The respondent further urges that proof of a State cause of action for violation of Georgia statutes, resulting in loss of revenue to the State of Georgia, would not necessarily involve proof of violation of the Twenty-first Amendment and of the Webb-Kenyon Act. Mere proof of non-payment of Georgia tax and warehouse charges by fraud, without any proof regarding the manner of importation, would support a claim for the lost revenue, if a personal action for the lost revenue did exist. No proof regarding the manner of importation, or transportation, would be necessary. Thus, there is no substantial identity of right, or proof, in a tort suit for damages for violation of the Twenty-first Amendment and the Webb-Kenyon Act, and a suit for fraudulent evasion of Georgia Revenue Laws.

In all the cases cited by the petitioner on pages 6-10 of the petition, in support of its contention that conflict exists between this decision and the decisions of the Second and Ninth Circuits, a substantial and real Federal question was asserted, and also an apparent question under state or other law was clearly asserted, alleged and relied upon in the complaint. Decisions holding that a Federal Court *may* decide a case on questions other than the Federal questions, where both are asserted or are apparent on the face of the pleading, do not conflict with the decision of the Court below in the case at bar.

No important constitutional issue, not heretofore decided by this Court, is present in the case at bar. The construction and effect to be given to the Twenty-first Amendment, Section 2, and the Webb-Kenyon Act, have been stated in prior decisions relied upon by the Court below. (R. 35-36)

The fact that the State of Georgia is a State of the United States, and may sue a citizen of another State in an original suit in the Supreme Court, will not change the character of the suit brought so that it will be transformed from one not asserting a Federal cause of action, or for that matter, any other cause of action, into a suit over which the District Courts of the United States have jurisdiction.

The petitioner has contended in its petition, at Page 15 thereof, that "The Federal Courts should frame or adjust remedies." The only right of the State of Georgia affected by the Twenty-first Amendment and the Webb-Kenyon Act, is the right to adopt legislation regarding alcoholic liquors without regard for the restrictions of the commerce clause. This is not the right asserted in the complaint, and is not the right for which the petitioner seeks protection or remedy. The right claimed in the complaint has not been created at common law, or by Federal or State Statutes, and does not exist.

The respondent respectfully urges that this Court has refused an injunction sued for by the State of Oklahoma to prevent shipment of liquor into the State of Oklahoma in violation of its laws, on the ground that the Federal Courts will not undertake to enforce State penal laws. *Oklahoma* v. *Gulf, Colorado & Santa Fe Railroad, et al,* 220 U. S. 290. This case was an original action in the Supreme Court of the United States which, of course,

has jurisdiction of actions by States against citizens of other States, without regard to their origin in Federal law. The Federal Courts have stated that they will not undertake to enforce State penal and tax statutes.

People of the State of California ex rel. McColgan v. *Burch,* 129 F. 2nd 421.
Craig v. *Southern Natural Gas,* 125 F. 2nd 66.
Wisconsin v. *Pelican Ins. Co.,* 127 U. S. 265.

CONCLUSION.

The action involved in the case at bar truly is an attempt to secure Federal imposition of a sanction against the respondent, which is not authorized by the laws of the United States, or the laws of any State.

It is therefore respectfully urged that the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, be denied.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Respondent.

In the

Supreme Court of the United States

October Term, 1951

No. 130

STATE OF GEORGIA, Petitioner

v.

J. B. WENGER, Respondent

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

---

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of Georgia prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed June 20, 1951.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Since the filing of the petition for certiorari in the above-styled case, there have developed additional factors which demonstrate the paramount importance of the constitutional issues on which a decision is sought. The intervening factors are:

(1) Besides the petitioner, twenty-three States of

the Union have filed an amicus curiae brief urging upon this Court the need for a decision of the important issues raised. This brief was not distributed to nor considered by this Court when it passed upon the petition because of its late receipt by the Clerk. The delay in arrival of this brief was occasioned principally by the fact that the final report of the Special Senate Committee to Investigate Organized Crime in Interstate Commerce (which to a great extent motivated the States to file the supporting brief) was not submitted to the Senate and ordered printed until August 31, 1951, and therefore, as a factor of importance, did not exist. It was not until after this committee, serving as a powerful searchlight, exposed to the public gave the plain fact that unless the position of these states is maintained, there is afforded no protection from organized interstate violators of the clear prohibition of the Twenty-first Amendment. Further, this delay was caused by the fact that the twenty-three States appearing are representative of every section of the country and mailing difficulties caused by the great distances were impossible to overcome in sufficient time. Also, the necessity of unanimity and mutual agreement upon reasons for urging this Court's favorable consideration of the petition for certiorari occasioned additional delay since a final draft had to be approved by all those joining.

(2) The findings and report [1] of the Senate Committee demonstrate that violators of the clear prohibition of the twenty-first Amendment are actively engaged in organized circumvention of that prohibition. As the Committee stated in its report and findings, certainly the Twenty-first Amendment "was mani-

[1] Excerpts from these reports pertinent to liquor are included in the amicus curiae brief as Appendix A, page 16.

festly not intended to be a shield for bootlegging activities which fatten organized crime." [2] The significance of this finding illustrates the importance of this question to the States because it is an admission by the Congress that there exists no Federal law save the Twenty-first Amendment which undertakes to protect the States from the out-of-state character of violations of local liquor regulations. It is also significant in consideration of the importance of the findings show that organized crime seeks to use the Twenty-first Amendment as a mere limitation on the power of Congress rather than as a constitutional prohibition demanding obedience, the language of which is as strong in its prohibition as the prohibitory language of the Fifteenth and Nineteenth Amendments which have been held by this Court to create enforceable rights.

(3) Because denial of certiorari "imports no expression of opinion upon the merits of the case," [3] it carries no support of the decision below nor of any of the views expressed in that opinion. This situation creates an uncertainty in the minds of the chief legal officers of half of the States of the Union as to whether the Twenty-first Amendment affords the protection that its words clearly import. It is this uncertainty and not merely the correctness or incorrectness of the decision below which this Court has often said is its guide in exercising its certiorari jurisdiction.

(4) Even though certiorari is ultimately denied (although petitioner feels that the reasons for certiorari herein contained are most compelling), it is urged that a rehearing be granted in order that petitioner will know that the Court has had before it for consideration all the intervening factors emphasizing the im-

[2] Senate Report No. 725, 82nd Congress, 1st Session, page 92.
[3] Agoston v. Pennsylvania, ____ U. S. ____, 95 L. Ed. 35.

portance of the question of law as it relates to so many citizens.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia

M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney General of Georgia

LAMAR W. SIZEMORE,
Assistant Attorney General of Georgia

Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

The Attorney General
of Georgia.

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In the

Supreme Court of the United States

October Term, 1951

No. 130

STATE OF GEORGIA, Petitioner

vs.

J. B. WENGER, Respondent

Brief of the States of Alabama, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Mississippi, Nebraska, New Hamphire, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia, Amici Curiae.

I.

STATEMENT OF POSITION

1. Purpose and Scope.

The States of Alabama, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Mississippi, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia, by their respective Attorneys General and pursuant to Rule 27-9(d) of the Court file this brief in support of the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 23, 1951, and reported in 187 F.2d 285.

The purpose of this brief is to urge this Court to grant certiorari so that a vitally important constitutional question, not heretofore decided by this Court, may be brought here for review.

The scope of this brief is to be confined to the fol-

lowing basic constitutional question: Does the Twenty-first Amendment, by virtue of its own force or as implemented by the Webb-Kenyon Act, create, in favor of the States, rights civilly enforceable. This question, in the belief of these States, has not heretofore been presented to this Court.

2. Interest of these Amici Curiae.

This basic constitutional question is of vital importance to the States herein represented. While the laws of these States and the scheme of liquor control utilized in them are widely different, there do exist problems common to all in the enforcement and control of the liquor traffic. Also common to all these States, in point of importance, is the question of to what extent the Twenty-first Amendment affords them the protection its clear language seems to indicate.

The national interest in this subject has been recently aroused by the reports [1] of the Special Committee of the United States Senate to Investigate Organized Crime in Interstate Commerce. The reports and findings of this committee have clearly demonstrated that violators of the prohibition of the Twenty-first Amendment are organized on a large scale and are operating across State lines.[2] While the primary purpose of this committee was to make an investigation to determine the need for appropriate legislation, its findings and recommendations focus attention on the inability of the States to cope with the out-of-State aspects of violations of their liquor laws. Further illustrated by these findings is the plain fact that

[1] Senate Report No. 2370, 81st Congress, Second Session; Senate Report No. 141, 82nd Congress, First Session; Senate Report No. 307, 82nd Congress, First Session; Senate Report No. 725, 82nd Congress, First Session.

[2] Pages 172-5, Senate Report No. 307, 82nd Congress, First Session.

unless the position of these States (that the Twenty-first Amendment creates rights civilly enforceable) is maintained, there is afforded no protection from organized interstate violators of the clear prohibition of the Twenty-first Amendment.[3] (See Appendix A, page 15, for Excerpts from the Committee's Reports.)

II.

ARGUMENT

1. **The Federal Constitution (Amendment XXI, Sec. 2) by its own force created a Federal right in the plaintiff State.**

   (a) **The plain language of the section purports to forbid and prohibit the acts of the defendant described in the complaint.**

The court below concluded that the complaint should be dismissed for failure to state a Federal claim upon which relief can be granted. In reaching this conclusion, that court, affirming the District Court, reasoned that because of similarity of language Section 2 of the Twenty-first Amendment should be given the same construction as that given the Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Sec. 122); that the Webb-Kenyon Act in effect only served to relieve states of the limitation on their power to legislate with respect to intoxicating liquors which was imposed by the Commerce Clause. (Constitution, Sec. VIII, Art. I) It is respectfully insisted that the court erred in reaching this conclusion. The language of Amendment XXI, Sec. 2 in clear and unmistakable terms purports to prohibit and forbid. It is true that no criminal sanction is attached to the violation of this prohibition. We shall

[3] Page 18, Senate Report No. 307, 82nd Congress, First Session; pages 91-2, Senate Report No. 725, 82nd Congress, First Session.

undertake to demonstrate, however, that the constitutional amendment by virtue of its own force becomes operative in the absence of any statutory implementation.

In the case of *Carter v. Virginia*, 321 U.S. 131, 138, this Court was concerned with the right of the State of Virginia to regulate the through transportation of intoxicating liquors which were admittedly intended for sale in the State of North Carolina in violation of the prohibitory laws of that State. This Court there decided that *through* carriage was not transportation or importation *into* a State within the meaning of the Twenty-first Amendment. It was concluded, however, that the State of Virginia had the right to impose reasonable regulations upon this interstate commerce, saying:

> "It is enough that Virginia could conclude in the absence of contrary Federal legislation that she could not safely permit the transportation of liquor through her territory by those who *concededly mean to break Federal laws* and the laws of a neighboring State." (Emphasis supplied.)

By marginal note this Court makes clear that the Federal laws which appellant admitted he meant to break were the Twenty-first Amendment, Sec. 2, and the Webb-Kenyon Act, 27 U.S.C. Sec. 122.

In *Duckworth v. Arkansas*, 314 U.S. 390, 397, Mr. Justice Jackson concurring specially in the result reached by the majority on a somewhat similar issue states:

> "Duckworth now contends that it is now our duty to assure him safe conduct as against the action of Arkansas although his goal is to violate both the laws of Mississippi *and the Federal Con-*

stitution. He asks us to hold that one part of the Constitution guarantees him the right to violate another. The law is not that tricky.

"Whether one transporting liquor across Arkansas to a legal destination might not have some claim to Federal protection, we do not need to consider. One who assails the constitutionality of the statute must stand on his own right to relief. Since this appellant had no rightful claim to protection for his trip, the whole purpose of which *was to violate the Constitution* which he envokes, we should leave him where we find him and for this reason I concur in the judgment of the Court affirming conviction." (Emphasis supplied.)

The views expressed in the *Carter* and *Duckworth* cases are wholly inconsistent with limiting the meaning of Section 2 of the Twenty-first Amendment to a mere diminution of power to control interstate commerce. They treat the prohibitory words as Federal law commanding obedience, notwithstanding the absence of a criminal penalty.

In fact, substantially the same contention with respect to the Webb-Kenyon Act was urged upon the Court in the early cases construing that Act. It was insisted that the Webb-Kenyon Act was an unconstituitonal delegation of Federal power to the States. In passing upon this contention, this Court in *In Re Rahrer*, 140 U.S. 545, 561, made abundantly clear the Federal nature of the enactment and said of Congress' action in passing the statute:

"In so doing Congress has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the States, or to grant a power not possessed by the States or to adopt

> State laws. It has taken its own course and made its own regulation applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in State laws in dealing with such property. . . ."

To the same effect is the Court's decision in *Adams Express Company v. Kentucky*, 238 U.S. 190. Since the adoption of the Twenty-first Amendment, this Court has upon more than one occasion considered the contention that Section 2 of that amendment should be construed in the light of the history of its passage and decisions under the Webb-Kenyon Act and limited by that history and those decisions. In the case of *State Board of Equalization v. Young's Market*, 299 U.S. 59, 63, Mr. Justice Brandeis disposed of the contention in summary fashion by saying:

> "We think the language of the amendment is clear. We do not discuss these matters."

In that case this Court gave an effect to the language of Section 2 which it could not have given to similar language in the Webb-Kenyon Act, holding that the Twenty-first Amendment allowed the direct imposition of a burden in the form of a license fee upon importing intoxicating liquors without a comparable license fee upon the locally manufactured product. Prior to the passage of the amendment it had been decided in *Vance v. Vandercook*, 170 U.S. 438, that a discriminatory burden could not be imposed upon intoxicating liquors under the language of the Webb-Kenyon Act. Two years after the decision of the *Young's Market* case, this Court decided *Mahoney v. Joseph Trinon Corporation*, 304 U.S. 401. There the contention was made that despite the Twenty-first Amendment, no State discrimination against interstate commerce in intoxicating liquor and in favor of

the locally manufactured product could be tolerated. Again the Court refused to limit power conferred by the Amendment, stating that the words of the Amendment were apt to confer upon the State power to forbid all importations which failed to comply with whatever conditions the State saw fit to prescribe.

It is familiar recent history that among the principal reasons urged for the repeal of the 18th Amendment was the reason that, in the view of many persons, the Federal Government had thereby trespassed upon a field of police power which is, from its very nature, essentially local (76 Cong. Record, 4140 et seq). Many who agreed with this view were nevertheless doubtful of the ability and power of the State to enforce its own police regulations respecting intoxicating liquor and, for that reason, advocated some measure of Federal protection for the so-called dry States. Both of these beliefs were doubtless reflected in the language of the platforms of major political parties upon which the campaigns of 1932 were conducted. The Democratic Party platform upon this subject contained the following:

> "We demand that the Federal government effectively *exercise its power* to enable the States to protect themselves against importation of intoxicating liquors in violation of their laws." (Emphasis supplied) (Appendix B, page 22.)

The Republican Party platform for the same campaign contained the following language:

> "We therefore believe that the people should have an opportunity to pass upon a proposed amendment the provisions of which, while retaining in the Federal Government the power to preserve the gains already made in dealing with the evils

> inherent in the liquor traffic, should allow the States to deal with the problem as their citizens may determine, but *subject always to the power of the Federal Government to protect those States where prohibition may exist* and safeguard our citizens everywhere from the return of saloons and attendant abuses." (Emphasis supplied.) (Appendix B, page 22.)

The Blaine Resolution, which became the Twenty-first Amendment, was considered by at least one Republican leader as conforming as nearly to the Republican Party platform "as you could get it." *New York Times*, February 17, 1933, page 1, column 1, quoting Representative Snell.

The President's Executive Order No. 2065, dated December 5, 1933, proclaiming the adoption and effectiveness of the Amendment, likewise recognized the implicit obligation to afford protection to the dry and local option States. In this Executive Order is the following language:

> "I call specific attention to the authority given by the 21st Amendment to the Government to prohibit transportation or importation of intoxicating liquors into any State in violation of the laws of such State."

It can hardly be doubted but that the States were the intended beneficiaries of the Twenty-first Amendment. To say that the Twenty-first Amendment was intended, as urged by the respondent, only to remove liquor from the inhibitions of the Commerce Clause and the Fourteenth Amendment is to ignore the plain language of Section 2 which reads:

> "The transportation or importation into any State,

territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

The traffic in intoxicating liquors is *prohibited* by this Section if it is in violation of State laws. The above language is not merely permission to the States to regulate liquor within their confines, but the language is an enunciation of a constitutional prohibition as strong as that of the Fifteenth or Nineteenth Amendments. If the Fifteenth and Nineteenth Amendments created rights in persons then it is respectfully urged that the Twenty-first Amendment created rights in the States and that it does not act as a mere limitation on the power of Congress or a mere delegation of power to the States but is a creation of and exercise of Federal sovereign power.

(b) Amendment XXI, Section 2, being plain and unambiguous, its language should be literally applied.

In discussing the *Webb-Kenyon Act*, this Court in *Adams Express Company v. Kentucky*, 238 U.S. 190, speaking through Mr. Justice Day, describes as elementary the principle that in ascertaining the meaning of a statute the first resort is to the language used. If that language is plain, there is an end to construction and the statute is taken to mean what it says.

In *State Board of Equalization v. Young's Market*, 299 U.S. 59, 63, 64, and in *Mahoney v. Joseph Trinor Corporation*, 304 U.S., 401, 404, this Court commented upon the clarity of the language contained in Section 2 of the Twenty-first Amendment and refused even to discuss reading into this clear language a limitation based upon the Court's decisions applying the *Wilson*

Act (27 U.S.C.A., Sec. 121), the *Webb-Kenyon Act* (27 U.S.C.A., Sec. 122) and the *Reed Amendment* (27 U.S.C.A., Sec. 1 note).

In *Lake Co. v. Rollins*, 130 U.S. 662, 670, Mr. Justice Lamar expressed this principle of construction with force and clarity as follows:

> "To get at the thought and meaning in a statute, a contract or a constitution, the first resort in all cases is to the natural significance of the words, and the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiciton of other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted and neither the courts nor the legislature have a right to add to it or take from it . . . .
>
> "There is even stronger reason for adhering to this rule in the case of a constitution than in a statute, since the latter is passed by a deliberative body of small numbers, the larger portion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for tension and revision of such a character, while constitutions, although framed by conventions, are yet created by the voters of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most objective interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

(c) Amendment XXI, Section 2, being prohibitory, is self-executing.

It is familiar law that prohibitory constitutional provisions are self-executing, at least to the extent that they create in behalf of their intended beneficiaries constitutional rights to be free of the prohibited acts. These rights confer a standing to sue and, we respectfully urge, give rise to a civil cause of action. Amendments 13, 14, 15 and 19 are among the provisions of the Constitution of the United States which have been recognized as self-executing. Not only may such a self-executing constitutional prohibition inhibit the doing of the act declared wrong, but upon occasion give rise to a right in one whom the amendment was designed to benefit. In *Guinn v. U. S.*, 238 U.S. 347, this Court considered the 15th Amendment, saying of it, at page 362, 363:

> "While in the true sense the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that if the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of striking down a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out."

Davis v. Burke, 179 U.S. 399, was to the same effect, as was *Ex Parte Yarbrough*, 110 U.S. 651 and *Neale v. Delaware*, 103 U.S. 370.

This Court considered the Thirteenth Amendment in *Clyatt v. U. S.*, 197 U.S. 207, saying of it that it, of

its own unaided force and effect, abolished slavery and established universal freedom.

The *Civil Rights Cases*, 109 U.S. 3, and *Ex Parte Virginia*, 100 U.S. 339, held the Fourteenth Amendment also to be of this same self-executing character. In the same connection, also see *Strauder v. West Virginia*, 100 U.S. 303.

This Court recognized in *Leser v. Garnett*, 258 U.S. 130, that the Nineteenth Amendment "is in character and phraseology precisely similar to the Fifteenth."

The Supreme Court of Georgia, in *Foster v. City of College Park*, 155 Ga. 174, 176, states:

> "The 19th Amendment to the Constitution of the United States providing that the right to vote shall not be denied or abridged on account of sex, is self-executing, and removes the electoral disqualification on account of sex."

Of like import is the decision of the Supreme Court of Alabama in *Groves v. Eubanks*, 205 Ala. 174. Many decisions of similar import could be cited but we deem such further citation unnecessary.

In considering the similar prohibition against interstate shipment of intoxicants contained in the Webb-Kenyon Act, the Supreme Court in *In Re Rahrer*, 140 U.S. 545, said that the prohibition contained in that Act was a Federal regulation of commerce. It so held as against the contention that the Act represented an unconstitutional attempt to delegate to the States what was essentially a Federal power. We submit that if, as has been said, Congress took its own course in enacting the prohibition contained in the Webb-Kenyon Act, then by parity of reasoning the prohibition contained in Section 2 of Amendment 21 is likewise a Federal

prohibition and of its own force demands obedience. The violation of this prohibition is a wrong against the States whom the amendment sought to protect just as the violation of Amendments 13, 14, 15 or 19 constitutes a wrong against any of those whom these Amendments were designed to protect.

(d) Amendment XXI, Section 2 is to be accorded more liberal construction than that formerly given the Webb-Kenyon Act.

Consistently, this Court has turned a deaf ear to those demands for a narrow construction of this provision of the constitutional amendment of the type formerly given the Webb-Kenyon Act. *Mahoney v. Joseph Trinor Corporation*, 304 U.S. 401, 404, and *State Board of Equalization v. Young's Market*, 299 U.S. 59, have previously been commented upon. In *Indiana Brewing Company v. Liquor Control Commission*, 305 U.S. 391, States were held, under the Amendment, to have authority to retaliate against discriminations aimed at their own product. In *Ziffron v. Reeves*, 308 U.S. 162, the Court sustained comprehensive state legislation with respect to the interstate transportation of liquor, holding the State to be completely unfettered by the Commerce Clause. Also see, *U. S. v. Frankfort Distilleries*, 324 U.S. 393. None of these decisions is consistent with the principle to which the Court adhered prior to the Eighteenth and Twenty-first Amendments by holding that the Webb-Kenyon Act allowed no discriminatory treatment of intoxicating liquors brought into the State from outside; clearly these recent decisions illustrate that this Court accords the Twenty-first Amendment a more literal interpretation than was accorded the Webb-Kenyon Act.

2. Violation of the right thus created and guaranteed by the Constitution and laws of the United States is an appropriate subject for judicial redress and is, therefore, actionable.

The States, herein represented, support the argument on this point as made by the petitioner in her petition heretofore filed, commencing on page 15. But in addition to the authorities there cited, this Court, in other cases, has held that a duty imposed by the Congress is not made any less a duty because no specific sanction was provided, and the Courts may adjust a remedy appropriate to the effectuation of the purposes of the statute. *Board of Commissioners v. United States*, 308 U.S. 343. Civil liability has been deemed an appropriate remedy by the Court in effecting the purposes of a statute. *Texas & Pacific R. R. Co. v. Regsby*, 241 U.S. 33; *Steel v. Louisville & N. R. Co.*, 323 U. S. 192, and *Tunstall v. Brotherhood of Locomotive F. E.*, 323 U.S. 210.

Also see: *Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks*, 281 U.S. 548; *Virginia R. Company v. System Federation*, 300 U.S. 515; *Deckert v. Independence Shares Corp.*, 311 U.S. 282.

Certainly it would appear that if the courts can adjust remedies to effectuate the purposes of a statute they may, by appropriate remedy, make effective the purpose of a constitutional provision. The legislative branch of government may not by its inaction fritter away constitutionally protected rights so that the beneficiaries of a clear provision of the Constitution are powerless to exert and enforce their rights in the courts simply because the Congress has not provided a sanction.

III.
CONCLUSION

The States, represented herein, submit that it has been demonstrated that the questions presented by the petition for certiorari are of vital importance. The Twenty-first Amendment "was manifestly not intended to be a shield for bootlegging activities which fatten organized crime." (Senate Report No. 725 at page 92.) We further submit that the court below committed error in ruling that petitioner's complaint failed to state a Federal claim upon which relief can be granted. We request that certiorari be granted and the decision of the court below be reviewed and reversed.

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APPENDIX A

Excerpt from Senate Report No. 307, commencing at page 18.

"With respect to the question of racketeering elements in the distribution of liquor there are now pending in the Congress bills S. 22 and H.R. 137, which were introduced by Senator McCarran and Congressman King and which heretofore have in previous sessions been sponsored by them and other Members of Congress. The bills as they now stand require the annual renewal of basic permits to the liquor industry. The committee is of the opinion that annual renewal may impose too much of a burden upon the industry and the Alcohol Tax Unit, and the committee recommends that the proposed requirement be relaxed to the extent of requiring renewal biennially. The Committee is also well aware of objections to the bill by the wholesale end of the liquor industry, which has made the point that such a bill would seriously impair the industry's ability to obtain credit. However, the committee believes that the problem of racketeering elements in the liquor industry is sufficiently serious to justify the passage of the basic permit sections of this legislation with the change noted above, and the committee is also of the opinion that the industry is overfearful of the effect it will have upon its ability to obtain credit.

"In recommending to the committee the passage of this bill, the Alcohol Tax Unit, through its representatives, has pointed out that many of the racketeering elements now in the industry are blanketed under the original post-repeal legislation with the result that the only effective means of eliminating them would be such new legislation.

"The committee does believe that the licenses of some individuals might be revoked on a positive determination that they are not persons of good moral character who would hold licenses against the public's interest. However, the committee is aware of the practical problem involved and therefore feels that the Alcohol Tax Unit must receive the support of the Congress if it is to perform its functions effectively. The committee takes no position on features of this legislation other than the ones specified above.

"*The bootlegging of liquor into dry and local option States has become a very serious problem because of the great volume of such illicit traffic. Many racketeers with connections in other illegal activities are engaged in this traffic. It has proven extremely lucrative, and is a substantial source of income to organized criminals. Moreover, it is a very vicious influence in the States affected.* To cope with this evil the committee is recommending that the Bureau of Internal Revenue take steps to require better identification of applicants for special tax stamps required of retail and wholesale liquor dealers.

"While this will aid local law enforcement officers in identifying the traffickers in illicit liquor, it does not provide a complete solution to the problem. Accordingly, the committee recommends the adoption of the bill introduced by Congressman Camp, House bill 1278, which would extend the same Federal protection to local option States as is now extended under Federal law to the wholly dry States.

"Under this amendment, the local option States would still be able to control the local traffic within their borders and to determine whether or not they want Federal assistance in preventing illicit shipments

of liquor into dry areas. Even the Camp bill would not bring a complete solution to the problem. However, with additional enforcement personnel, plus a vigorous effort to identify all applicants for special tax stamps, it is believed that much can be accomplished. It is true that the cost of investigation of applicants for special tax stamps cannot be paid out of the $27.50 fee, but the public policy question involved is so great that this should not be too serious a consideration." (Emphasis supplied.)

* * * * *

Excerpt from Senate Report No. 307, commencing at page 172.

"The committee found that leading hoodlums have penetrated the liquor industry, principally the distribution end of the business, due to failure of the industry to assume its proper share of responsibility and to failure of our laws and law-enforcement agencies adequately to cope with the situation.

"Many of the Nation's leading hoodlums got their start as bootleggers during prohibition. Many have a history of prohibition arrests. The transition from bootlegging to the legitimate liquor business was a natural one. Unfortunately, however, many racketeers found it hard to drop the methods of operation which characterized their rum-running days and consequently, *the committee was not surprised to find hoodlums involved in huge liquor blackmarket deals during World War II and in present-day bootlegging operations into dry areas.* After the committee found the hoodlum element playing a dominant role in liquor distribution in Kansas City, it decided that this situation was serious enough to warrant further investigation since competition within the industry, at least in Kan-

sas City, was definitely affected; the reputation of the overwhelmingly legitimate members of the liquor industry was involved and most important, the public interest was vitally concerned.

"Accordingly, the committee proceeded to accumulate information on the conduct of the liquor industry in various parts of the country, questionnaires were addressed to the Nation's leading distillers and breweries; and the industry's attitude was explored in hearings before the committee.

"In Kansas City, the committee found such notorious hoodlums as Joe and Vincent di Giovanni holding exclusive franchises for several leading brands of whisky including Schenley's and Seagrams. After the disclosures made by this committee, the liquor licenses of these two Mafia hoodlums were revoked by the State liquor control supervisor. However, the committee feels that the revocation was nullified by the subsequent reissuing of these licenses to the sons of these gangsters. The committee also found evidence in Kansas City that the retail liquor dealers association was mob controlled and that violence was used to force liquor dealers into the association.

"In Chicago, the Manhattan Brewery was owned and controlled by the Capone mob during prohibition days. At the present time it is called the Canadian Ace Brewery and is controlled by Alexander Greenberg, who was an associate and financial backer of many Capone syndicate members. Canadian Ace Beer was sold in Kansas City by Tony Gizzo, a leading member of the Binaggio-Gargotta mob, and a suspected leader of the Mafia. He told the committee that he persuaded tavern owners that they should use Canadian Ace, but he denied using violence.

"The committee found several other former Capone associates involved in a substantial manner in the wholesale and retail distribution of liquor. Joseph Fusco, an old-time bootlegger and present associate of such Capone mobsters as Pat Manno, the policy racketeer, is president of a $2,000,000 corporation which holds exclusive franchises for many leading brands of whisky. Rocco DeStefano, another Capone syndicate associate, controlled a chain of retail liquor stores in Chicago. He is also a stockholder along with Fusco in the Bohemian Brewing Co. of Joliet, Ill.

"In New Jersey, Joseph Reinfeld, a leading liquor distributor, and Abner ("Longie") Zwillman owned substantial stock as late as August 1950 in the whisky distilling firm of Browne-Vintners Corp., which they controlled until 1940 when it was sold to Seagrams. Reinfeld, Zwillman and, among others, Jimmy Rutkin, an associate of Zwillman, were notorious bootleggers during prohibition, during which time they were partners in some of Bronfman's operations in Canada. Zwillman and Rutkin now claim that Reinfeld defrauded them in the Browne-Vintners sale and Rutkin is presently suing Reinfeld for $22,000,000. Since 1940, Reinfeld has been unable to obtain a liquor license in New York State, but he has a license in New Jersey. New York State, however, allows his son-in-law to operate and Reinfeld sells all of his imports of certain products to his son-in-law's company in New York. Reinfeld Importers, Ltd., of New Jersey, is the exclusive distributor in 38 States for Gordon's Gin and also is the exclusive importer for Haig and Haig and Piper Heidsick champagne.

"In 1948 the State Liquor Authority of New York revoked the liquor license previously held by Irving Haim for the International Distributors Co. Haim

promptly moved over to New Jersey. This company has the exclusive agency for King's Ransom and House of Lords Scotch. In 1937 Haim, an ex-bootlegger, negotiated the purchase of J. J. Turney & Sons, the holding company for William Whitely Liquors, Ltd., the distillers of King's Ransom and House of Lords Scotch. The purchase was made in the name of Haim with money obtained from a New Orleans bank with notes secured by Haim, Phil Kastel, and Frank Costello. Prior to this purchase, Phil Kastel was the 'good will' man for this company and received an override commission on every case of this Scotch sold in the United States. Part of the original purchase deal was for Costello to take Kastel's place, in receiving the override, which was to be increased in amount. In 1940, according to Haim, Costello and Kastel disassociated themselves from the distribution of William Whitely Liquors at the insistence of the late William Helis, one of the partners in the enterprise. Yet, in 1943 Frank Costello was bragging that King's Ransom and House of Lords Scotch were 'his whiskies.' And there is evidence that in 1943 Haim delivered to Costello a small package, valuable enough to have to be placed in a safe.

"In Tampa the committee found a Mafia hoodlum, Salvatore 'Red' Italiano, to be the general manager of a wine and beer distributing business. The committee also found a man with a narcotics distributing record, Louis Swed, to be the principal distributor of Budweiser beer in Florida. In Des Moines, Iowa, Lew Farrell, an alleged Capone syndicate hoodlum with a considerable criminal record, who allegedly controlled the race wire in that city, and who helped get the notorious Gargotta brothers of Kansas City out of jail in 1947, distributes Blatz and Prima-Bismarck beers. Until recently he handled Canadian Ace beer. His inactive

partners in the Canadian Ace distributing firm were the brother and sister of Alexander Greenberg, owner of Canadian Ace. In spite of Farrell's record and an adverse report on him by field supervisors of the Federal Alcohol Tax Unit in Des Moines and St. Paul, the ATU gave him a license in 1945 to distribute beer. His license is now up again before the ATU.

"The fact that the committee has mentioned the names of certain leading distillers and brewers should not be construed to mean that they have been the only or even the worst offenders. *Practically every large distillery and brewery has granted franchises to racketeer dealers, most of whom were blanketed in under the original licensing activities of the Alcohol Tax Unit after the repeal of prohibition.*

"Following some of these disclosures, the committee invited representatives of the major distillers to a private hearing in Washington. The committee wanted to give the industry an opportunity to review the committee's findings and to suggest measures for correcting this situation.

"As a result of this meeting, the industry did make certain constructive recommendations. However, the committee found that the industry as a whole believes it is the responsibility of the Government to keep hoodlums out of the industry.

"The committee feels that while no industry can control the character of those who deal in its products, any industry has a responsibility for the character of distributors holding exclusive franchises.

"*The attitude of the industry was further explored in the committee's hearing on March* 9, 1951, *with revenue and liquor commissioners from most of the Southern States.* These commissioners told a sordid

story of a huge bootlegging operation extending into the South out of Cairo, Ill.

"This bootlegging operation is fully reminiscent of the 1920's, with its hi-jacking of trucks, camouflaging of liquor shipments, use of fictitious names, counterfeiting of Federal and State liquor stamps, violation of ICC regulations and corruption of public officials. Some of the wholesalers involved in the current ring were found by the committee to have been connected with a huge World War II liquor black-market ring.

"The leading distillers were asked by a conference of southern revenue and alcohol commissioners to cancel the franchises of distributors found to be engaging in the bootlegging ring and they agreed to do so, but conditions failed to improve.

"In a further effort to determine the extent of hoodlum infiltration in the liquor industry, and what was being done by the industry to correct this situation, questionnaires were addressed to the principal distillers and breweries throughout the country requesting information with respect to their distributors and their franchise policies. An analysis of replies from over 100 distillers and 240 breweries indicates that while the large majority of franchises are granted to legitimate, upstanding businessmen, all the major distillers and some of the leading breweries have granted distribution franchises to some hoodlums, including some in the top ranks of organized crime. While these distillers and brewers state that they did not know of the criminal associations at the time they granted the franchises, they were almost all vague on the question of whether they would fire a distributor upon finding he had criminal associations.

"Perhaps the best summing up of the general atti-

tude of the industry is the reply of one major distiller whose products, incidentally, were found to be involved in past black market and present-day bootlegging activities:

> "Since practically all wholesale distributors handle the products of many distilleries, we do not believe that any purpose would be served by our termination of the distribution franchise * * * we feel that if this criminal record were such as to make him an undesirable distributor * * * his license should be revoked by the proper authorities * * * we believe that it is the responsibility of the various governmental departments who issue these licenses to weed out undesirables.

"The committee feels that the industry should share responsibility with the Federal Government for getting and keeping the hoodlum element out of the industry. The Federal Government, however, has a number of powers at its disposition which it has not used to full advantage. In addition to the need for a State license to operate in the liquor business, it is necessary to have a license from the Alcohol Tax Unit of the Treasury Department. The committee fails to understand, for example, how the Alcohol Tax Unit could grant a wholesaler's permit to hoodlums such as Joe DiGiovanni and Lew Farrell. Much can be done by stiffer application of existing regulations to correct the situation but the committee feels that additional legislation is also needed." (Emphasis supplied.)

APPENDIX B

Excerpt from Platform of the Republican Party, 1932.
The World Almanac and Book of Facts for 1933.

THE EIGHTEENTH AMENDMENT

"The Republican party has always stood and stands today for obedience to and enforcement of the law as the very foundation of orderly government and civilization. There can be no national security otherwise. The duty of the President of the United States and the officers of the law is clear. The law must be enforced as they find it enacted by the people. To these courses of action we pledge our nominees.

"The Republican party is and always has been the party of the Constitution. Nullification by nonobservance by individuals or State action threatens the stability of government.

"While the Constitution makers sought a high degree of permanence, they forsaw the need of changes and provided for them. Article V limits the proposals of amendments to two methods: (1) Two-thirds of both houses of Congress may propose amendments or (2) on application of the Legislatures of two-thirds of the States a national convention shall be called by Congress to propose amendments. Thereafter ratification must be had in one of two ways: (1) By the Legislatures of three-fourths of the several States or (2) By conventions held in three-fourths of the several States. Congress is given power to determine the mode of ratification.

"Referendums without constitutional sanction cannot furnish a decisive answer. Those who propose them innocently are deluded by false hopes; those who propose them knowingly are deceiving the people.

"A nation-wide controversy over the Eighteenth Amendment now distracts attention from the constructive solution of many pressing national problems. The principle of national prohibition as embodied in the amendment was supported and opposed by members of both great political parties. It was submitted to the States by members of Congress of different political faith and ratified by State Legislatures of different political majorities. It was not then and is not now a partisan political question.

"Members of the Republican party hold different opinions with respect to it and no public official or member of the party should be pledged or forced to choose between his party affiliations and his honest convictions upon this question.

"We do not favor a submission limited to the issue of retention or repeal, for the American nation never in its history has gone backward, and in this case the progress which has been thus far made must be preserved, while the evils must be eliminated.

"We therefore believe that the people should have an opportunity to pass upon a proposed amendment the provision of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow States to deal with the problem as their citizens may determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses.

"Such an amendment should be promptly submitted to the States by Congress, to be acted upon by State conventions called for that sole purpose in accordance

with the provisions of Article V of the Constitution and adequately safeguarded so as to be truly representative."

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Excerpt from Platform adopted by the Democratic National Convention, 1932.

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"REPEAL OF THE 18TH AMENDMENT.

17. We favor the repeal of the Eighteenth Amendment.

To effect such repeal, we demand that the Congress immediately propose a constitutional amendment to truly representative conventions in the States called to act solely on that proposal.

We urge the enactment of such measures by the several States as will actually promote temperance, effectively prevent the return of the saloon and bring the liquor traffic into the open under complete supervision and control by the States.

We demand that the Federal Government effectively exercise its power to enable the States to protect themselves against importation of intoxicating liquors in violation of their laws.

Pending repeal, we favor immediate modification of the Volstead Act to legalize the manufacture and sale of beer and other beverages of such alcoholic content as is permissible under the Constitution and to provide therefrom a proper and needed revenue."